

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. ISAKSON

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STATE OF NEBRASKA, APPELLEE,

V.

JORDAN R. ISAKSON, APPELLANT.

Filed March 20, 2012. No. A-11-531.

Appeal from the District Court for Hall County, WILLIAM T. WRIGHT, Judge, on appeal thereto from the County Court for Hall County, DAVID A. BUSH, Judge. Judgment of District Court reversed and cause remanded with directions.

T. Charles James, of Langvardt, Valle & James, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

INTRODUCTION

Jordan R. Isakson appeals the decision of the district court affirming his conviction for driving under the influence of alcohol. Because the county court did not make sufficient factual findings when overruling Isakson's motion to suppress, we reverse, and remand with directions.

BACKGROUND

The State filed a complaint charging Isakson with first-offense driving under the influence. Isakson filed a motion to suppress all evidence obtained as a result of the stop, detention, interrogation, administration of field test, search, and arrest, which he alleged were all performed without reasonable suspicion or probable cause.

The county court conducted a hearing on the motion, and Nebraska State Patrol Trooper Wendy Brehm was the sole witness to testify. On July 15, 2009, at approximately 12:39 a.m., Brehm was patrolling on U.S. Highway 34 in Hall County, Nebraska. The highway has a posted

speed limit of 50 m.p.h. As Brehm traveled westbound, she observed a pickup truck traveling eastbound. Brehm visually estimated the vehicle's speed to be 57 m.p.h. After observing the vehicle for approximately 15 seconds, she activated the radar--a "Stalker" radar speed detection device--to confirm the pickup truck's speed. Brehm testified that the radar emits a higher tone and pitch when it detects a speed in excess of the posted limit. When Brehm heard that tone and pitch, she looked at the radar and observed the display to read 58 m.p.h. Brehm then initiated a traffic stop.

Brehm testified that she first became certified on the device in 1990, that she was required to demonstrate proficiency in the use of the radar and in visually estimating speed as part of the process, and that the State Patrol's policy is to recertify every 2 years. She was recertified on May 1, 2007, and then certified again on September 2, 2009. Brehm checks the accuracy of the radar at the beginning and end of each shift. She testified that it performs a self-test and shows whether it passes or fails and that there are tuning forks to check the radar's accuracy. It tested properly at both the beginning and the end of her shift on July 15. During Brehm's shift, she operated the radar in the moving mode. The speedometer reading of the patrol vehicle was consistent with the radar display of the patrol vehicle's speed.

Brehm identified Isakson as the operator of the truck. She had Isakson accompany her to the patrol vehicle in order to issue a warning for speeding. While Isakson was in the patrol vehicle, Brehm could smell an odor of alcoholic beverage coming from his breath. Upon Brehm's inquiry, Isakson stated that he had consumed a few beers in Hastings, Nebraska. Brehm then administered the horizontal gaze nystagmus test inside the patrol vehicle. Brehm testified that Isakson "showed lack of smooth pursuit in both eyes." She observed involuntary jerking of the eye at maximum deviation and prior to maximum deviation in both eyes. Brehm concluded that Isakson was under the influence of alcohol based on Isakson's admission to consuming alcohol and his performance on the horizontal gaze nystagmus test. Isakson refused to submit to any further field sobriety tests.

Brehm testified that Isakson told her to give him a preliminary breath test and that she did so. Brehm testified that she observed Isakson for 15 minutes before having him blow into the device--starting at 12:40 a.m. and having him blow into the instrument at 12:55 a.m. Isakson objected that the device was not approved under the Nebraska Administrative Code because it was not "an Alco-Sensor, an Intoxilyzer or a Lifelock." After Brehm looked at the device, she testified that it was an "Intoximeter Alco-Sensor." She testified that Isakson's result was .087. Brehm arrested Isakson after concluding that he was operating the vehicle under the influence of alcohol.

The video recording shows that Brehm asked Isakson how much he had to drink, that Isakson said a couple of beers, and that he said he had been at a bar in Hastings. Isakson admitted to driving 55 m.p.h. because his GPS device indicated that the speed limit was 55 m.p.h. The video shows that less than 15 minutes elapsed from the time that Brehm asked Isakson if he had anything in his mouth until the time that he gave his sample.

The county court took the motion to suppress under advisement. On March 5, 2010, the court entered a journal entry which stated that it sustained Isakson's objection to receipt of exhibit 4--the checklist technique for preliminary breath tests--and to Brehm's testimony regarding the results of the preliminary breath test. The court denied Isakson's motion to

suppress without setting forth any factual findings. In a letter to counsel for the parties, which enclosed a copy of the court's journal entry, the court further stated, "I think that even without the preliminary breath test, the officer had a reasonable and articulable basis for stopping [Isakson] and sufficient probable cause for placing him under arrest."

Isakson appealed to the district court, setting forth 14 errors. One of the errors was that the county court erred by failing to include findings of fact in its order overruling Isakson's motion to suppress. The district court entered a comprehensive order on appeal, and it affirmed the overruling of the suppression motion. The district court reasoned that there was no significant factual dispute and that from the county court's journal entry and accompanying letter, "it is clear that [the county court] found that even without considering the results of the [p]reliminary [b]reath [t]est, sufficient probable cause existed to arrest [Isakson] and require that he submit to a chemical test of his blood, breath or urine."

Isakson timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Isakson assigns that the county court erred in (1) overruling his motion for suppression of evidence, (2) failing to include necessary findings of fact in its order overruling the motion to suppress, (3) failing to perform its gatekeeping function by refusing to consider Isakson's "Daubert Motion" prior to trial, (4) executing the sentence, and (5) finding Isakson guilty beyond a reasonable doubt.

STANDARD OF REVIEW

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or for abuse of discretion. *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id.*

In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, an appellate court will uphold its findings of fact unless they are clearly erroneous. But an appellate court reviews de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search. *State v. McCave*, *supra*.

ANALYSIS

We first address Isakson's assignment of error relating to the lack of factual findings by the county court in overruling the motion to suppress. In *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996), the Nebraska Supreme Court held that district courts shall articulate in writing or from the bench their general findings when granting or denying a motion to suppress, with the degree of specificity required varying from case to case. In *State v. Puls*, 13 Neb. App. 230, 690 N.W.2d 423 (2004), this court extended the *Osborn* holding to county courts.

The Supreme Court recognized that "findings of fact may be indispensable to a proper appellate review." *State v. Osborn*, 250 Neb. at 66, 547 N.W.2d at 145. "Without guidance, [an

appellate court] might not know whether the trial court rejected a defendant's factual contentions or had acted on some legal basis." *Id.* at 66-67, 547 N.W.2d at 145. "But *Osborn* does not require reversal or remand of every case in which a trial court's findings could have been more complete." *State v. Seberger*, 279 Neb. 576, 582, 779 N.W.2d 362, 366-67 (2010).

Isakson challenged several matters in his motion to suppress. He denied speeding and denied that his truck's speed was "validly clocked." He contended that the horizontal gaze nystagmus was performed against his wishes, that the test was not properly administered, and that it was of no probative value regarding whether he had consumed alcohol. Isakson further claimed that the preliminary breath test was unlawfully administered and improperly calibrated.

However, the county court made no factual findings on the issues, other than to the extent it sustained the motion. From the court's journal entry, we know that it sustained Isakson's objections to the receipt of an exhibit and to testimony concerning the results of the preliminary breath test. Otherwise, it merely states that Isakson's "motion to suppress should be and the same hereby is denied." In the court's letter to counsel, the court stated that even without the preliminary breath test, Brehm had a reasonable and articulable basis for stopping Isakson and sufficient probable cause to place him under arrest. Presumably, speeding was the basis for the stop. But in stating that Brehm had sufficient probable cause to arrest Isakson, the county court's reasoning is not apparent.

The absence of any factual finding on this critical issue makes it impossible for us to determine whether the county court rejected Isakson's factual contentions or made its decision based on a conclusion of law. And because the county court failed to articulate findings of fact for its denial of the motion to suppress, the district court could not review the same for clear error. Accordingly, we reverse the judgment of the district court affirming the county court's denial of Isakson's motion to suppress with directions to the district court to remand the cause to the county court to set aside Isakson's conviction and vacate the sentence and to make findings of fact and conclusions of law in this case based upon the evidence presented at the January 20, 2010, hearing on Isakson's motion to suppress.

CONCLUSION

Because the county court did not articulate sufficient findings of fact in overruling Isakson's motion to suppress, we reverse, and remand with directions.

REVERSED AND REMANDED WITH DIRECTIONS.